IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN

S.B. Criminal Appeal No.374/2001

Raju Munim S/o Heera Lal ...accused appellant
Versus
The State of Rajasthan ...Respondent

Date of Judgment ::: March 9, 2006

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Harendra Singh Sinsinwar with
Shri M.P. Khandelwal for the accused appellant
Shri B.S. Chhaba, P.P., for the State

By the Court:-

Accused appellant Raju Munim @ Rajendra Singh Meena has been convicted and sentenced by the Special Judge, N.D.P.S. Cases, Jhalawar, vide its judgment and order dated 4.6.2001, in Sessions Case No.22/2000, under Section 8/21 of the N.D.P.S. Act, 1985 (for short, 'the Act'), to 12 years rigorous imprisonment and a fine of Rs.1,00,000/-; in default of payment of fine, to further undergo one year's additional rigorous imprisonment.

Relevant facts, in brief, for disposal of this appeal are that Sub Inspector, Police Station, Bhawanimandi, lodged First Information Report at Police Station Bhawanimandi, on 29.6.2000, wherein it

was alleged that he received a secret information from one informer and on that basis he reached at Tagar crossing. He directed Constable Ramesh Chand to bring two independent and respectable inhabitants of the concerned locality to attend and witness the search. He found one person of a description as stated by the informer. On asking, he disclosed his name as Raju Munim @ Rajendra S/o Heera Lal. Meanwhile Constable Ramesh Chand came back and told that no inhabitant of the locality is willing to attend and witness the search and seizure against the smuggler. Thereafter he directed two Constables Ram Prasad and Latoor Lal to attend and witness the search and seizure. He apprised the accused with his right about his search either before Magistrate or before Gazetted Officer. The accused gave his consent in writing of his search by him. Thereafter a search was conducted in presence of the witnesses. The contraband 'smack', weighing 105 gram with two polythene bags, was recovered from the possession of the accused. 5 Gram smack was taken as estimated weigh of polythene bag. The net weigh of smack was 100 gram. He took two samples of 10 gram each and remaining 80 gram smack was sealed in packet. After investigation of the matter, charge-sheet was

submitted in the case against the accused. The case was committed for trial to the trial court.

The learned trial court framed charge against the accused appellant under Section 8/21 of the Act. The accused denied the charge and claimed to be tried. The prosecution examined eight witnesses and produced documentary evidence Exhibit P-1 to Exhibit P-22. Thereafter statement of the accused was recorded under Section 313 Cr.P.C. No evidence, oral or documentary, was produced on behalf of the accused, in defence. The learned trial court, after hearing the arguments of both the sides, convicted and sentenced the accused appellant as indicated above.

The learned counsel for the accused appellant contended that PW-7 Yashwant Singh was only a Sub Inspector and was not In-charge of the Police Station, therefore, in view of the Notification No.F.1(3)FD/EX/85-1, dated 16.10.1986, issued by the State of Rajasthan, he was not a person authorized under Section 42 of the Act, therefore, as search and seizure was made in the present case by unauthorized person, therefore, there is a violation of mandatory provisions of Section 42 of the Act. He referred to the decisions of this Court in Bhanwar Lal Vs. State

of Rajasthan, 1999 Cr.L.R.(Raj.) 708 and Bherulal Vs. State of Rajasthan, 2004 (1) Cr.L.R. (Raj.) 612.

Learned counsel for the accused appellant further contended that in view of Section 50 of the Act the provisions of sub-section (4) of Section 100 of the Cr.P.C. were applicable in the present case in respect of search and seizure of the contraband and in view of sub-section (4) of Section 100 Cr.P.C. it was the duty of the recovery officer to call independent and respectable witnesses of the concerned locality before proceeding with the search. He contended that in the present case PW-7 Yashwant Singh directed PW-6 Ramesh Chand at 2.25 PM to bring two inhabitants of the locality but he did not make any sincere effort and made a report at 2.40 PM i.e. within fifteen minutes itself that no one is willing to attend and witness the search and seizure. Thereafter PW-7 Yashwant Singh directed two Constables PW-1 Latoor Lal and PW-2 Ram Prasad to attend and witness the search and seizure. Both the witnesses were police officials and cannot be said to be independent witnesses in the case. He also contended that Exhibit P-8, the site plan, shows that the accused was found standing near the office of Excise Department and shops were also situated; the

time was 2.25 PM and even the government servants were available in the office of Excise Department but no request was made either by PW-6 Ramesh Chand or PW-7 Yashwant Singh, to them. He referred to the decisions of the Hon'ble Supreme Court in Narsi Vs. State of Haryana, 1998 (4) Crimes 105 (SC); State of Punjab Vs. Balbir Singh, (1994)3 SCC 299, Ram Lal Vs. The State of Rajasthan, S.B. Criminal Appeal No.270/2002, decided by this Court on 28.2.2006 and Saudan & Another Vs. State of Rajasthan, 2003 (1) RCC 501.

Learned counsel for the appellant further contended that this is a case where there is variance in weigh of sample seized vide Exhibit P-3 and the sample sent to the Forensic Science Laboratory (FSL). As per recovery memo Exhibit P-3 the weigh of sample was 10 gram whereas from Exhibit P-22, the report of FSL, the sample received by the FSL is 9.783 gram. He further contended that from Exhibit P-3 it is not clear that seal used in sealing the sample of contraband, was sealed and to whom it was given. He referred to the statement of PW-7 Yashwant Singh and the recovery memo Exhibit P-3, wherein it was mentioned that the personal seal of the recovery officer was not available, therefore, contraband was

sealed by the seal of Police Station Bhawanimandi. He referred to the decisions in the cases of Najmabano @ Khurshid @ Phoolwall Vs. State of M.P., 1998 (1) EFR 339 and Rajesh Jagdamba Avasthi Vs. State of Goa, (2005) 9 SCC 773.

He also contended that the contraband recovered in the present case was not produced in the court, therefore, it could not be identified by the prosecution witnesses nor it could be corroborated by the FSL Report. The contraband was not exhibited in the present case. He also contended that sample taken in the present case on 29.6.2000 was not sent immediately for chemical examination but it was sent to FSL after a delay of 27 days, which is clear from Exhibit P-12, the receipt dated 26.7.2000 of FSL.

He lastly contended that in case this Court does not agree with his above submissions, then at least the case of accused-appellant for the purpose of reduction of term of sentence of imprisonment be considered. He contended that the accused appellant is in jail since 29.6.2000 and has already undergone sentence of imprisonment for about five years and eight months and quantity of contraband recovered in the present case was lesser than the commercial quantity as specified under Section 2 of the Act,

vide Notification dated 19.10.2001, therefore, in view of lesser quantity of the contraband than the commercial quantity, the benefit of amendment made in the Act in October,2001 where in such circumstances the maximum sentence is ten years rigorous imprisonment can be extended and sentence of imprisonment in the present case can be reduced to the period of imprisonment of five years and eight months, already undergone by the accused appellant.

The learned Public Prosecutor, on the other hand, contended that the contraband smack was recovered from the possession of the appellant. The learned trial court has rightly convicted and sentenced the accused appellant after appreciating oral and documentary evidence in the case.

I have considered the submissions of the learned counsel for both the parties and minutely scanned the impugned judgment and record of the trial court.

In Bhanwar Lal's case (supra) this Court, with reference to Section 42 of the Act, held that there is no evidence in the case that the searching officer was S.H.O. at the relevant time. The searching officer was simply a Sub Inspector, therefore, the search and seizure by unauthorized

person vitiates the trial.

In Bherulal's case (supra) also this court considered that the Inspector or the Sub Inspector, who are not posted as S.H.O. were not empowered for search and seizure in view of the Notification dated 16.10.1986 and it was held that the search and seizure was made by an unauthorized person and conviction was set aside.

For ready reference, the Notification No.F.1(3)FD/EX/85-1, dated 16.10.1986, issued by the State of Rajasthan and published in the Rajasthan Gazette, Extra, Part IV-C (II), is reproduced as under:-

> "S.O.115.- In exercise of the powers conferred by Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No.61 of 1985) the State Government hereby authorise all Inspectors of Police, and Sub-Inspectors of police, posted as Station House Officers, to exercise the powers mentioned in Section 42 of the said Act with immediate effect:
> Provided that when power is exercised by Police Officer

> other than Police Inspector of the area concerned such officer shall immediately hand over the person arrested and articles seized to the concerned Police Inspector or S.H.O. of the Police Station concerned.”

In Narsi's case (supra) the Hon'ble Supreme Court held that in absence of any independent evidence, seizure of a pistol and cartridge from the possession of the appellant becomes doubtful.

In State of Punjab Vs. Balbir Singh's case (supra) it was observed that the provisions of Section 100 Cr.P.C. would be applicable to arrest and search in the case relating to NDPS Act.

In Ram Lal's case (supra) this court considered the provisions of sub-sections (4) and (8) of Section 100 of the Cr.P.C. and held as under:-

> “For ready reference, sub-sections (4) and (8) of Section 100 of the Cr.P.C., are reproduced as under:-
>
> > “(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other

> locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.
>
> (8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code (45 of 1860).”

A bare perusal of above referred provisions clearly show that it was the duty of PW-9 Madan Lal, the S.H.O., to call upon two or more independent and respectable inhabitants of the locality before making a search to attend and witness the search and required to issue an order in writing to them or any of them so to do. From Exhibit P-1 it is clear that PW-9 Madan Lal, the S.H.O., did not call upon any independent and respectable inhabitant of the locality in which the place to be searched is situate or of any other locality, if no such inhabitant of the said locality was available or was willing to be a witness to the

search. Exhibit P-1 shows that PW-9 Madan Lal, the S.H.O., directed PW-1 Daulat Ram to bring two independent witnesses at 8.55 PM and PW-1 Daulat Ram reported on the same order, i.e. Exhibit P-1, at 9.05 PM, within ten minutes itself that no one is willing to become witness against these smugglers; thereafter no efforts were made in this regard by PW-9 Madan Lal, the S.H.O. No order in writing was issued to any person of the locality. The prosecution witnesses clearly admitted that it was a crowded area where search was made and not only houses but shops were also situated. The time was only 8.55 PM and it cannot be said that no one was available there. The S.H.O., for the reasons best known to him, did not consider it fit and proper to issue an order in writing to any inhabitant of the locality or any other locality to show that he made sincere efforts in this regard. If he would have issued an order in writing to any inhabitant of the locality or any other locality then the said inhabitant would not have refused or neglected to attend and witness the search. There is specific provision in sub-

section (8) of Section 100 of the Cr.P.C. that in case any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing, delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code.

In view of the above discussions it cannot be said that there was any independent local witness to the search and seizure in the present case. PW-2 Parmanand and PW-3 Mohan Lal, both, were the constables subordinate to PW-9 Madan Lal, the S.H.O., and they cannot be said to be independent witnesses, therefore, it cannot be said that the provisions of Section 50 of the Act read with Section 100 of the Cr.P.C. were complied with in the present case. In these circumstances the recovery of the contrabands in the present case cannot be said to be proved beyond reasonable doubt and the accused persons are entitled to get the benefit of doubt. This point has been considered by me in detail in the case of Abid Khan Vs. The State

of Rajasthan, S.B. Criminal Appeal No.722/2000, decided on 31st January 2006 and in that case I also considered the judgments of this Court in Nadeem Vs. State of Rajasthan, 1998 Cr.L.R. (Raj.) 392 and Saudan and Another Vs. State of Rajasthan, 2003 (1) R.C.C. 501. This Court in Saudan's case (Supra) also considered the judgment of the Hon'ble Supreme Court in State of Punjab Vs. Balbir Singh (Supra).

In Saudan's case (supra) it was held that in absence of independent witnesses, the testimony of two police constables, who were the witnesses of search and seizure, does not inspire confidence of the court.

In Najmabanoo @ Khurshid @ Phoolwall's case (supra), the M.P. High Court considered the effect of weigh of sample reached in Laboratory for analysis, whether it is less or more, and held that in absence of proper explanation in this regard, this fact creates doubt on the prosecution case.

In Rajesh Jagdamba Avasthi's case (supra) the Hon'ble Supreme Court considered the effect where weight of sample was less than the seized quantity and held that prosecution failed to explain this discrepancy and in such circumstances the conviction

cannot be upheld. The Hon'ble Supreme Court observed as under:-

> “We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the junior scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery

> proceeding is considerably eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasised, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful."

After considering the provisions of law in the context of submissions of the learned counsel for the appellant I consider the facts and evidence of the present case. There is no doubt that PW-7 Yashwant Singh was holding the post of Sub Inspector at Police Station Bhawanimandi whereas S.H.O. at Police Station Bhawanimandi was Pradeep Kumar (PW-8). However it was explained that at the time when he received an information from the informer then the S.H.O. had gone in connection with investigation of case No.366/99 under Section 395 IPC and Case No.161/99 under Section 307 IPC. The learned trial court did not agree with the submissions of the learned counsel for the accused and agreed with the

submissions of the learned Public Prosecutor that PW-7 Yashwant Singh was the In-charge of the Police Station at that particular time in absence of S.H.O. Pradeep Kumar, in view of Section 36 of the Cr.P.C. and it was merely an irregularity. I find that Section 36 Cr.P.C. is not applicable in the present case because Section 36 Cr.P.C. prescribes that police officers, superior in rank to an officer in charge of Police Station, may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. As per Section 36 Cr.P.C. the police officers, who are superior in rank, may exercise the same powers of the in charge of the police station but in the present case PW-7 Yashwant Singh was not a superior officer than the S.H.O. Pradeep Kumar. Section 42 of the Act lays down that any such officer, who is empowered in this behalf by general or special order of the Central Government or a State Government, may enter into such search and seizure. The State Government has issued the Notification dated 16.10.1986 under Section 42 of the Act. The Public Prosecutor, appearing on behalf of the State of Rajasthan, has not shown any other Notification superseding to above referred

Notification dated 16.10.1986, therefore search and seizure of contraband in the present case by unauthorised officer vitiates the trial of the case.

I further find that it was the duty of PW-7 Yashwant Singh to call upon two or more independent and respectable inhabitants of the locality before making a search to attend and witness the search and required to issue an order in writing to them or any of them so to do. From Exhibit P-16 it it clear that PW-7 Yashwant Singh directed PW-6 Ramesh Chand to bring two independent inhabitants of the locality but it appears from his report that he did not make any sincere efforts and within fifteen minutes itself at 2.40 P.M. he reported that no inhabitant is willing to attend and witness the search and seizure against smuggler. His report shows that he did not give any details as to whom he requested and who refused to attend and witness the search and seizure. Thereafter no efforts were made by PW-7 Yashwant Singh to call any inhabitants of the locality. He did not issue any order in writing to any inhabitants to attend and witness the search and seizure. The recovery was made at 3.00 PM and even government servants were available in the office of Excise Department, as the recovery of contraband was made near to the office of

Excise Department, which is clear from Exhibit P-8, the site plan. PW-1 Latoor Lal and PW-2 Ram Prasad, both are constables, who were made witnesses in the case and both were subordinate to PW-7 Yashwant Singh, therefore, in these circumstances, it cannot be said that the recovery of contraband was free from all doubts and in these circumstances, the accused-appellant is entitled to get the benefit of doubt.

The Hon'ble Supreme Court in Rajesh Jagdamba Avasthi's case, also considered the effect of variance in the weigh of sample seized and sample received by FSL and it was held that in absence of satisfactory explanation by the prosecution in this regard the case becomes doubtful.

From Exhibit P-3 it is not clear whether the seal used in the case was sealed and it was given to any independent person, or not. The sample was not sent for chemical examination for 27 days.

The effect and net result of the above discussion is that search and seizure in the case was done by unauthorised officer and recovery of contraband is not proved beyond reasonable doubt and the prosecution has failed to prove the case against the accused beyond all reasonable doubts and in these circumstances, there is no option, except to acquit

the appellant.

Accordingly the appeal of appellant deserves to be allowed and the same is allowed. The impugned judgment passed by the trial court is set aside and the accused is acquitted. The appellant is in jail and he may be set at liberty forthwith, if his custody is not required in any other case.

(Narendra Kumar Jain) J.

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